SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT H. DOLEMAN, DECEASED, PETITIONER,

vs.

HARRY LEVINE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Record from Supreme Court of District of Columbia	A	1
Caption (omitted in printing)	A	
Amended declaration	1	1
Plea in abatement	5	5
Demurrer to plea in abatement	8	6
Memorandum overruling demurrer	9	7
Stipulation as to amended declaration	9	7
Judgment	10	8
Affidavit in forma pauperis	11	9
Fiat, Cox, J.	12	10
Assignments of error	13	10
Designation of record	14	11
Clerk's certificate (omitted in printing)	16	
Proceedings in United States Court of Appeals for the District of Columbia	18	12
Argument and submission (omitted in printing)	18	
Opinion, Troner, J.	19	17
Judgment	23	18
Designation of record	24	18
Clerk's certificate (omitted in printing)	26	

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[fols. a & b] [File endorsement omitted]

[fol. c] [Caption omitted]

[fol. 1]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

At Law. No. 83365

CHARLES M. DOLEMAN, Administrator of the Estate of ROBERT R. DOLEMAN, Deceased, Plaintiff,

vs.

HARRY LEVINE, Defendant

AMENDED DECLARATION—Filed February 6, 1934

Comes now the plaintiff, Charles M. Doleman, administrator of the estate of Robert R. Doleman, deceased, with leave of the Court first had and obtained, and files this, his Amended Declaration, as follows:

The plaintiff, Charles M. Doleman, to whom letters of administration have been issued by the Supreme Court of the District of Columbia, holding a Probate Term, upon the estate of Robert R. Doleman, deceased, and who is now the administrator of said estate and brings suit as such, sues the defendant, Harry Levine; that Robert R. Doleman, deceased, son of the plaintiff, at the time of his death, to wit, on the 3rd day of January, 1933, and for a long time prior thereto, to wit, for a period of more than five years, contributed on an average of Five ($5.00) Dollars a month to the support and maintenance of the plaintiff; that pursuant to paragraph (a), Section 933, of an Act of Congress, entitled "Longshoremen's and Workers' Compensation Act", approved March 4, 1927, and made applicable as a Workmen's Compensation Law in the District of Columbia by an Act of Congress entitled "An Act to Provide Compensation for Disability or Death Resulting from Injury to Employees in Certain Employment in the District of Columbia", and for other purposes, approved May 17, 1928, Mary E. Doleman, widow of said deceased applied [fol. 2] for, received and is receiving compensation under

an award passed by the Deputy Commissioner, United States Employees' Compensation Commission, on April 28, 1933.

That pursuant to paragraph (a) of Section 933 of said Act, the plaintiff, Charles M. Doleman, father, next of kin and dependent of Robert R. Doleman, deceased, elected to proceed against the defendant herein, Harry Levine, for the wrongful death of said deceased, and gave notice of same to the Deputy Commissioner, United States Employees' Compensation ——, said notice being given in the manner and on the forms provided by the said commission, for that heretofore, to wit, on the 3rd day of January, A. D. 1933, the death of the said Robert R. Doleman, intestate, was caused by the careless, reckless, negligent and wrongful act of the defendant, by and through his agent, servant and/or employee (hereinafter referred to as agent, servant and/or employee); the said careless, reckless, negligent and wrongful act of the defendant, by and through his agent, servant and/or employee, was such that, if the death of the said Robert R. Doleman had not ensued, would have entitled him to maintain an action against the defendant, that is to say, that about 1:20 P. M., on, to wit, the 3rd day of January, A. D. 1933, the plaintiff's intestate was engaged in his regular course of employment as an employee of the Potomac Electric Power Company, working in a manhole with his head protruding above the street, on R Street, N. E., near the intersection of Lincoln Road, N. E.; that the aforesaid manhole was protected by a caution barricade with two red flags, which said barricade surrounded the said manhole; that the said plaintiff's intestate was working in the said manhole with his back facing west on R Street, N. E.

That on the day and year aforesaid, the defendant, Harry Levine, hereinafter referred to as the defendant, was the [fol. 3] owner of a Chevrolet Sedan automobile; that the said automobile was being operated by one Harry F. Barner, agent, servant and/or employee of the defendant, in the regular course of his employment; that on the day and year aforementioned, the defendant, by and through his agent, servant and/or employee, was proceeding in an easterly direction on R Street, N. E., just east of the intersection of Lincoln Road, N. E., in the said Chevrolet Sedan automobile; and the plaintiff states that it then and there became and was the duty of the defendant, by and through

his agent, servant and/or employee operating said Chevrolet Sedan automobile at the time aforesaid, to use reasonable care and prudence in the operation of said Chevrolet Sedan automobile so as not to injure persons working in said manhole, to use reasonable care and prudence in the operation of said Chevrolet Sedan automobile so as not to run into the said caution barricade which surrounded the said manhole where the plaintiff's intestate was working, to use reasonable care and prudence in the operation of the said Chevrolet Sedan automobile so as not to run the front and rear axles of said Sedan automobile over the head of the plaintiff's intestate while he was working in the said manhole, to use reasonable care and prudence in the operation of said Chevrolet Sedan automobile so as not to endanger property or the life of any individual, and in conformity with Section 9, paragraph b, of the Traffic and Motor Vehicle Regulations in and for the District of Columbia, then and there in force and effect, as amended on February 27, 1931.

Yet, the defendant, by and through his agent, servant and/or employee, notwithstanding his duty as aforesaid, then and there carelessly, recklessly, negligently and wrongfully operated the said Chevrolet Sedan automobile [fol. 4] in violation of his aforesaid duty, to wit, the defendant, by and through his agent, servant and/or employee, drove the said Chevrolet Sedan automobile over the said manhole, into and upon the said caution barricade which surrounded and protected the said manhole; that the defendant, by and through his agent, servant and/or employee, drove the front and rear axles of the said Chevrolet Sedan automobile into, over and upon the head and upper part of the body of the plaintiff's intestate, who was working in the said manhole at the time; and the defendant, by and through his agent, servant and/or employee, operated the said Chevrolet Sedan automobile in violation of Section 9, paragraph b, of the Traffic and Motor Vehicle Regulations in and for the District of Columbia, as amended February 27, 1931, then and there in force and effect, reading as follows:

"Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful and wanton disregard of the rights or safety of others, or without due caution and circumspection, and at a speed or in a manner so as

to endanger or be likely to endanger any person or property, shall be guilty of reckless driving."

In this, the defendant, by and through his agent, servant and/or employee, did not keep a proper lookout to ascertain what was in front of said Chevrolet Sedan automobile, did not keep the said Chevrolet Sedan automobile under proper control, that he made no effort to avoid running into the excavation barricade which surrounded the said manhole in which the plaintiff's intestate was working.

Whereby and by reason whereof, on the day and year aforesaid and while the said Chevrolet Sedan automobile owned by the defendant and operated by and through his agent, servant and/or employee was proceeding in an easterly direction on R Street, N. E., east of the intersection of Lincoln Road, N. E., the defendant did negligently, carelessly and wrongfully permit and cause his said Chevrolet Sedan automobile to run into, over and upon the [fol. 5] plaintiff's intestate, while the said intestate was working in the said manhole in the regular course of his employment on R Street, N. E., east of the intersection of Lincoln Road, N. E.; and the defendant, by and through his agent, servant and/or employee, did inflict the following injuries upon the plaintiff's intestate as a result of the aforesaid negligence: a fractured head, a punctured lung, a crushed chest and a ruptured heart; which said wounds and injuries then and there received and sustained by the plaintiff's intestate caused his death on the day and year aforesaid; and the plaintiff's intestate left surviving him his wife, Mary E. Doleman, and your plaintiff, his father, and by reason of the premises and by the law, Section 1301 of the Code of Laws of the District of Columbia (1924), an action has accrued to the plaintiff for damages to be assessed with reference to the injury resulting from the death of the plaintiff's said intestate, and they have sustained damages in the sum of Ten Thousand ($10,000.00) Dollars.

Wherefore, plaintiff brings this suit and claims of the defendant Ten Thousand ($10,000.00) Dollars damage, besides costs.

Nathan A. Dobbins, Attorney for Plaintiff, Administrator of the Estate of Robert R. Doleman.
Nathan A. Dobbins, Attorney for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

PLEA IN ABATEMENT—Filed November 24, 1933

* * * * * * *

Now comes the defendant, Harry Levine, and for plea in abatement of the writ and declaration in the above entitled case says that the plaintiff's intestate, Robert R. [fol. 6] Doleman, was, on the 3rd day of January, 1933, employed by the Potomac Electric Power Company, and was engaged in the regular course of his said employment at the time of the accident complained of; that following the death of said Robert R. Doleman as a result of said accident, his widow, Mary E. Doleman, made claim for compensation against the said Potomac Electric Power Company under and by virtue of the provisions of the Act of Congress entitled "Longshoremen's and Harbor Workers Compensation Act", approved March 4, 1927, made applicable as a workmen's compensation law in the District of Columbia by an Act of Congress entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes", approved May 17, 1928; that pursuant to said claim the Deputy Commissioner, United States Employees' Compensation Commission, in case No. 26,549, entered an award on the 28th day of April, 1933, by virtue of which the said Potomac Electric Power Company, as the employer of the said Robert R. Doleman, was ordered to pay, has paid, and is paying installments of compensation to the said Mary E. Doleman; that by the provisions of said Acts of Congress, all right of the said Mary E. Doleman and the Administrator of the estate of said Robert R. Doleman to recover damages for the death of said Robert R. Doleman was transferred and assigned to the Potomac Electric Power Company; that the plaintiff in this cause has no right, interest or authority to bring this suit in his own name as administrator; and that said suit should be abated and dismissed.

And for further plea in abatement to the writ and declaration in the above entitled cause the defendant says that said cause was commenced on the 1st day of November, 1933; that subsequent to the commencement of said suit, on November 13, 1933, the Potomac Electric Power Com-

pany, in its own right and for the use of Charles M. Dole-
[fol. 7] man, administrator of the estate of Robert Dole-
man, filed its declaration and issued writ against this de-
fendant in this Court for damages for the identical tort,
alleging the death of Robert Doleman through the negli-
gence of this defendant, said suit being Law No. 83404;
that the said Charles M. Doleman, administrator as afore-
said, the use plaintiff in the latter suit, and the said Charles
M. Doleman, administrator in this suit, are the same per-
son and not other or different persons, and that the defend-
ant in the latter suit and the defendant in this suit are
one and the same person and not different persons, and
that the cause of action mentioned in the declaration in
the latter suit and the cause of action mentioned in this
suit are identical; that the latter suit seeks to collect dam-
ages for the alleged wrongful death of Robert Doleman,
by the Potomac Electric Power Company in its own right
and for the use of said Charles M. Doleman, administrator,
which is the same damages for the same alleged wrongful
death sought in this suit by Charles M. Doleman, adminis-
trator of the estate of Robert Doleman, as aforesaid; and
that said latter suit is still pending and that by reason of
the pendency of said latter suit this suit should be abated
and dismissed.

Harry Levine. Brashears & Townsend, by Edw. S. Brashears; Wilson L. Townsend, Albert F. Beasley, Attorneys for Defendant.

Duly sworn to by Harry Levine. Jurat omitted in printing.

[fol. 8] In Supreme Court of District of Columbia

Demurrer—Filed December 4, 1933

* * * * * * *

Comes now the plaintiff, by his attorney, Nathan A. Dobbins, and says the Plea in Abatement heretofore filed herein is bad in substance.

Nathan A. Dobbins, Attorney for Plaintiff.

The following points will be urged at the hearing of the above-mentioned demurrer:

1. That no valid assignment passed to the Potomac Electric Power Company by the acceptance of compensation on the part of Mary E. Doleman.

2. That the said Mary E. Doleman was not the proper person to validly exercise the right of election for the purpose of accepting compensation and binding the next of kin and persons entitled to compensation.

3. That Sections 1301 and 1302 of the District of Columbia Code have not been repealed by the Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia under act of Congress approved May 17, 1928.

4. That the Potomac Electric Power Company is estopped from maintaining any action for the wrongful death of [fol. 9] Robert R. Doleman, deceased.

5. That the Plea in Abatement shows upon its face its legal insufficiency to abate the Declaration filed herein.

6. And other matters appearing upon the face of the record.

Nathan A. Dobbins, Attorney for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OVERRULING DEMURRER TO PLEA IN ABATEMENT —Filed January 27, 1934

* * * * * * *

The plaintiff's demurrer to the plea in abatement is overruled for the reasons stated in the memorandum filed this day in Potomac Electric Power Company v. Harry Levine, At Law No. 83,404.

Joseph W. Cox, Justice.

January 24, 1934.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION AS TO AMENDED DECLARATION—Filed February 6, 1934

* * * * * * *

Whereas the plaintiff has requested and obtained leave of Court to file an amended declaration in this cause for the

purpose of adding an allegation that Charles M. Doleman was a dependent of Robert R. Doleman, and the amended declaration having been filed, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that the defendant's plea in abatement, the plaintiff's demurrer to the plea in abatement and the memorandum opinion of the Court overruling the demurrer to the plea in abatement, all of which have heretofore been filed in [fol. 10] this cause, shall be taken and considered as applying to the amended declaration with the same force and effect as they applied to the original declaration.

Nathan A. Dobbins, Attorney for Plaintiff. Albert F. Beasley, of Counsel for Defendant.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

JUDGMENT—February 6, 1934

Session resumed pursuant to adjournment, Hon. Joseph W. Cox, Justice, presiding.

* * * * * * *

Upon consideration of the oral motion this day made for leave to file an amended declaration herein, it is ordered that said motion be, and the same is hereby granted, said amended declaration to be filed forthwith. Whereupon, it appearing to the Court that a stipulation was filed in this cause this day wherein it is agreed between the parties hereto that the defendant's plea in abatement, the plaintiff's demurrer to said plea in abatement and the ruling of the Court upon said demurrer shall be taken and considered as applying to the amended declaration herein, with the same force and effect as that applied to the original declaration. Further, the plaintiff now, in open Court, elects to stand upon the demurrer filed herein to the plea in abatement, and it appearing to the Court that said demurrer was overruled upon the 27th day of January, 1934, judgment is accordingly ordered.

Wherefore, it is considered that this cause stand abated; that the defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiff by his attorney [fol. 11] of record, in open Court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars ($100.00) with leave to deposite Fifty Dollars ($50.00) with the clerk in lieu thereof.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

AFFIDAVIT IN FORMA PAUPERIS—Filed February 8, 1934

* * * * * * *

1. Your petitioner in the above entitled cause respectfully shows unto the Court that he is the administrator of the estate of Robert R. Doleman, deceased; that letters of administration having been issued to him by the Supreme Court of the District of Columbia, holding a Probate Court, which said letters have not been revoked, but are still in force and effect; that the deceased left no assets, real or personal, other than a cause of action against Harry Levine for his wrongful death on the 3rd day of January, 1933, while your petitioner's intestate was working in a manhole on R Street, N. W., near Lincoln Road, in the regular course of his employment as an employe of the Potomac Electric Power Company.

2. Your petitioner, administrator of the estate of Robert R. Doleman, deceased, states that the estate owns no real or personal property other than the said cause of action above-stated; that he has been advised and believes that the appeal which has been noted in the above entitled cause is meritorious and warrants perfecting; that by reason of the fact that there is no property in the estate to pay the cost of appeal, or to give as security for said cost, he believes this court ought to permit him to proceed in prosecuting the said appeal without prepayment of costs.

[fol. 12] Wherefore, the premises considered, your petitioner prays:

That he, as administrator of the estate of Robert R. Doleman, deceased, be permitted to perfect and prosecute the appeal noted in the above entitled cause without prepay-

ment of costs and fees in the Supreme Court of the District of Columbia.

Charles M. Doleman, Administrator of the estate of Robert R. Doleman, Deceased.

Duly sworn to by Charles M. Doleman. Jurat omitted in printing.

FIAT

Let the appeal in the above entitled cause be perfected without prepayment of costs and fees in the Supreme Court of the District of Columbia.

JOSEPH W. COX, Justice.

[fol. 13] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed February 9, 1934

* * * * * * *

The errors committed by the Court are:

1. The Court erred in overruling the plaintiff's Demurrer to the defendant's Plea in Abatement, and in entering judgment for the defendant.

2. The Court erred in its construction of paragraph B of Section 933 of the District of Columbia Workmen's Compensation Act (Act of Congress approved March 14, 1927, as amended by Act approved May 17, 1928, 45 Stat. at L. 600, C. 612; U. S. C. A., Title 33, Chapter 18).

3. The Court erred in holding that the acceptance of compensation by the widow of a deceased employe under Section 933 (b) of the District of Columbia Workmen's Compensation Act transfers the cause of action for wrongful death of said deceased to the employer even though the widow is neither the administratrix nor the only next of kin of said deceased, nor sole party or dependent entitled to compensation.

4. The Court erred in holding that a dependent of a deceased employe under the said District of Columbia Workmen's Compensation Act, who has properly elected to pro-

ceed against the third party responsible for the wrongful death of the deceased employe and has become administrator for that purpose, has no right to maintain the cause of action against the said wrongdoer where the widow has accepted compensation under the said District of Columbia Workmen's Compensation Act.

5. The Court erred in holding that the acceptance of compensation under the District of Columbia Workmen's Compensation Act works as an assignment of the entire cause of action to the employer against the wrongdoer even though there is another dependent under the said Act, who is [fol. 14] also the administrator and a next of kin of the said deceased employe, and who has properly elected to proceed against the said wrongdoer.

6. The Court erred in its memoranda opinion, holding that the case of Ætna Life Insurance Company vs. Moses (287 U. S. 530) has given to the employer the right to maintain the cause of action against the wrongdoer where a person entitled to compensation has accepted same under the District of Columbia Workmen's Compensation Act.

Nathan A. Dobbins, Attorney for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed February 9, 1934

* * * * * * *

Comes now the plaintiff in the above entitled case and designates the parts of the record to be included in the transcript, said parts being considered sufficient for the determination of the question raised on appeal:

1. Amended Declaration.
2. Plea in Abatement to Amended Declaration.
3. Demurrer to Plea in Abatement.
4. Memorandum of Cox, Justice.
5. Stipulation of counsel for plaintiff and defendant.
6. Minute entry showing leave of Court to file Amended Declaration.

7. Minute entry of plaintiff's election to stand on Demurrer to Plea of Abatement as applied to Declaration as amended.

8. Judgment against plaintiff for costs and noting of appeal.

9. Affidavit of plaintiff in lieu of cost bond or cash deposit for cost on appeal.

[fol. 15] 10. Assignment of errors.

11. This Designation of Record.

Nathan A. Dobbins, Attorney for Plaintiff.

Service of a copy of the foregoing Designation of Record is hereby acknowledged this 8th day of February, A. D. 1934.

Albert F. Beasley, of Counsel for Defendant.

[fol. 16] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 17] [File endorsement omitted.]

[fol. 18] Minute Entry of Argument and Submission, Oct. 4, 1934, omitted in printing.

[fol. 19] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6210

(Argued October 4, 1934. Decided November 5, 1934)

CHARLES M. DOLEMAN, Administrator of the Estate of Robert H. Doleman, Deceased, Appellant

v.

HARRY LEVINE, Appellee

Appeal from the Supreme Court of the District of Columbia

Before Martin, Chief Justice, and Robb, Hitz, and Groner, Associate Justices.

Nathan A. Dobbins, of Washington, D. C., for appellant.

Edward S. Brashears, Wilson L. Townsend, and Albert F. Beasley, of Washington, D. C., for appellee.

OPINION

GRONER, Associate Justice:

On January 3, 1933, Robert H. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in one of the streets of Washington City, was struck by an automobile owned by Harry Levine—an alleged third party wrongdoer—and sustained injuries from which he died that day. Doleman left surviving, his widow, Mary E. Doleman, his father, Charles M. Doleman, and a brother, as his heirs at law and next of kin.

The widow elected to receive compensation from the power company, Doleman's employer, under the District of Columbia Compensation Act (Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A., 901, et seq.). The dependent father elected not to receive compensation, and as administrator instituted an action under the wrongful death statute to recover against Levine. On the 13th day of November, the power company (the employer) likewise brought an action against Levine (sec. 33 (d)).

In the suit of the administrator, Levine filed a plea in abatement setting forth and alleging the pendency of the two actions and also that the cause of action, if any, to recover for Doleman's death was assigned by the terms of the Compensation Act (the election of the widow) to the employer, and that the action of the administrator was not maintainable. The administrator demurred to the plea, [fol. 20] and the court below overruled the demurrer and entered judgment for the defendant. From that judgment this appeal is taken.

The appeal involves the construction of section 33 of the act or, stated differently, who is the proper party plaintiff in an action against a third party wrongdoer under the facts shown above? Here it is insisted on behalf of the administrator that the widow, by accepting compensation, cannot transfer the entire cause of action to the employer so as to give the employer the exclusive right to maintain the action; that since the Compensation Act gives the right of election severally, the action of one of the beneficiaries is not binding on the other.

In the interest of clarity, we set out in full the applicable paragraphs of section 33.

"Sec. 33. (a) If on account of a disability or death for which compensation is payable under this act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) *Such* employer on account of *such* assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such

compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

[fol. 21] The employer shall pay any excess to the person entitled to compensation or to the representative.

* * * * * * *

"(h) The deputy commissioner may, if the person entitled to compensation under this act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election."

In substance, appellant asks us to construe the assignment provisions of section 33 as confined (a) to a case where the employee survives and accepts compensation, or (b) where in the event of death there is no person entitled to compensation under the act (see section 44). In other words, appellant would read subsection (a) of 33 as giving to the injured person the right to accept compensation or to recover damages against a third person, and subsection (b) as vesting in the employer, in the event of such election, the right to recover damages from the third person, and he would restrict the benefits of the assignment provisions of (d) to cases where there is no person entitled under the act to compensation and where, as is required under (c), the employer pays $1,000.00 into a fund created by the act.

As the Supreme Court said in the Ætna case, to which we shall presently refer, the statute is not free from ambiguity. Subsections (c) and (d) undoubtedly vest in the employer the absolute right to recover damages in the case in which there is no person entitled under the act to receive compensation, where the employer has complied with section 44. If the words in (d) "such assignment" be confined to the conditions named in (c) and not made applicable to (b) there would be strong ground for the position appellant takes; and it may very well be argued that if the Congressional intent had been to make the assignment apply equally under the different conditions of the two subsections it would have been provided for by using the words "such assignments"; but, having regard to the general purpose of the act, we think it can be fairly concluded Congress intended to vest an actionable assignment in the em-

ployer, as well in cases where injury results in death, as where the employee survives and accepts compensation, for in either case the employer is required to make specific payments, and when made, the undeniable purpose of the assignment provision is to secure reimbursement where the injury or death is due to the wrongful act of a third person.

If, therefore, it should be held that, in a case of death, where one beneficiary elects to receive compensation and another not to, the employer's exclusive right to bring the action is lost, the result would be either that the employer's right to reimbursement would be denied or the third party would be subjected to two separate and independent suits for the same cause of action. The most casual reading of the act necessarily excludes either of these assumptions. And this, as we think, was the conclusion reached by the Supreme Court in Ætna Life Insurance Company v. Moses, 287 U. S. 530. In that case, which went from this court, the facts briefly, were these:

An employee of a building contractor, while in the performance of his work, was killed through the negligence of a third party. His widow filed a claim under the Compensation Act and an award of compensation, to be paid by [fol. 22] the employer, was duly made. The widow was thereafter appointed administratrix of the estate of her deceased husband, and an action was begun against the third party by the insurance carrier of the employer in its own name. We held that under the provisions of the District of Columbia laws the administratrix was the proper party plaintiff (57 F. (2d) 440).

The Supreme Court took a different view and, while conceding that 33 (b) of the act, read literally, would in a wrongful death case give the employer nothing, since the person whose rights were assigned would have no right as such to recover for the death, nevertheless held that, read in connection with succeeding sections, the purpose was to give the employer the same control over an action for wrongful death and the distribution of the proceeds as in a case where the injury resulted only in disability. In this view, it is clear that the effect of the decision is to hold that the act gives the employer the right to sue in his own name the third party wrongdoer wherever the beneficiaries under the act accept compensation, and we think, by the same reasoning, where only part of the beneficiaries accept

compensation, for the court also says (page 540): "Concluding that where the employer is given anything to recover it is the full recovery provided by the wrongful death act, we do not think, as did the courts below, that the rights thus conferred may be enforced only by an action brought in the name of the personal representative."

In the facts here, the employer, having paid compensation to the widow, under the provisions of the act is entitled to recover the amount paid. We think this is perfectly clear and, if it be granted, it follows inevitably that in the light of the above quoted language of the Supreme Court the right to recover part is the right to recover all. If any other rule is adopted, it will lead to the confusion, expense, or the injustice, we have already pointed out. On the other hand, in construing the statute to recognize the employer's exclusive right to bring the action where *any* beneficiary elects to take compensation, we have a case of hardship to no one, for there is specific provision in the act for distribution to the personal representative of the excess of the recovery, the employer sharing only to the extent of his own liability.

Affirmed.

A true copy. Test:

——— ———, Clerk, United States Court of Appeals for the District of Columbia.

[fol. 23] IN UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

October Term, 1934

No. 6210

CHARLES M. DOLEMAN, Administrator of the Estate of Robert H. Doleman, Deceased, Appellant,

vs.

HARRY LEVINE

Appeal from the Supreme Court of the District of Columbia

JUDGMENT—November 5, 1934

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed.

Per Mr. Justice Groner.

November 5, 1934.

Mr. Justice Van Orsdel took no part in the consideration or decision of this case.

[fol. 24] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed Nov. 8, 1934

The Clerk in the preparation of the transcript of record on Petition for Certiorari to the Supreme Court of the United States will include the following papers and proceedings:

1. The Transcript of Record.
2. The Minute Entry of the Argument.
3. Opinion of the Court.
4. Judgment.
5. This Designation.
6. Clerk's Certificate.

Nathan A. Dobbins, Attorney for Plaintiff in Error.

[fol. 25] [File endorsement omitted.]

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 39,202. District of Columbia, U. S. Court of Appeals, Term No. 574. Charles M. Doleman, Administrator of the Estate of Robert H. Doleman, Deceased, Petitioner, vs. Harry Levine. Petition for a writ of certiorari and exhibit thereto. Filed December 13, 1934. File No. 574, O. T., 1934.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1935

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6122-C)